

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, INC., <i>et al.</i>,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i>,	:	Judge Barrett
	:	
Defendants.	:	

**DECLARATION OF DAVID BURKONS, M.D., IN SUPPORT OF PLAINTIFFS’
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

David Burkons, M.D., declares as follows:

1. I am a board-certified obstetrician-gynecologist. I received my M.D. degree from the University of Michigan in 1973.
2. I am licensed to practice medicine in the state of Ohio. In 2014, I founded the Northeast Ohio Women’s Center (NEOWC), where I serve as Medical Director. Prior to starting NEOWC, I was in private practice with University Hospitals in Cleveland, and I also served as Medical Director of Preterm for approximately ten years.
3. As NEOWC’s Medical Director, I supervise physicians and clinicians and provide direct reproductive health care to patients. I also manage the provision of all surgical abortion services at NEOWC, and I am responsible for developing NEOWC’s policies and procedures.
4. I submit this declaration in support of Plaintiffs’ motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Defendants from applying the Ohio Department of Health (“ODH”) Director’s March 17, 2020, order—barring all “non-

essential” surgeries and medical procedures in Ohio during the COVID-19 outbreak—to ban most surgical abortions indefinitely.

5. The facts I state here are based on my experience, my review of NEOWC’s business records, information obtained in the course of my duties at NEOWC, and personal knowledge that I have acquired through my service at NEOWC. If called and sworn as a witness, I could and would testify competently thereto.

NEOWC’s Provision of Abortion Care

6. NEOWC performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient’s last menstrual period (“LMP”), and surgical abortion through 15 weeks and 6 days LMP.

7. In 2019, NEOWC performed 1901 abortions. Of those, 540 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion.

8. In January and February 2020, NEOWC performed 223 abortions. Of those, 142 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion.

9. NEOWC operates two facilities, one of which is licensed as an ambulatory surgical facility (“ASF”) under Ohio law. *See* Ohio Rev. Code § 3703.30. The ASF is located in Cuyahoga Falls, Ohio. NEOWC’s other facility is located in Shaker Heights, Ohio, and only medication abortion is performed there. All abortions performed by NEOWC take place in these two facilities.

10. Surgical abortion requires minimal PPE. NEOWC clinicians use surgical masks, reusable protective eyewear, nonsterile gloves, and typically reusable gowns. Non-sterile gloves are needed for any ultrasound, laboratory exam, and cleaning.

11. NEOWC does not have or use any N95 masks. Only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.

NEOWC's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

12. NEOWC is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

13. Since the COVID-19 outbreak, in addition to complying with the Director's Order, NEOWC has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the spread of COVID-19 in the communities where we offer services. For example, although in normal times we welcome support people accompanying abortion patients, we have decided not to allow such companions (except those accompanying minors) to enter our health centers in order to reduce the overall number of people exposed to one another.

14. We have also made changes to the flow of patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever.¹ Only screened individuals whose screen is negative can proceed to the front desk to check in. If a patient shows symptoms of COVID-19, we refer them to their primary care physician and ask them to come back after they have been cleared. We have reconfigured our waiting areas to allow for social distancing, and where there is inadequate space, patients are asked to wait in their cars. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

15. After receiving the Director's Order, NEOWC promptly adopted a policy to implement the Director's Order, and is providing care in compliance with that policy. A true and correct copy of NEOWC's policy is attached as Exhibit A.

¹ Similarly, all staff are screened daily for symptoms.

16. After Preterm, WMCD, and PPSWO received letters from the Attorney General's office threatening enforcement if they did not comply with the Director's Order, and after further communication with the Attorney General's office, NEOWC amended our policy, and continued to comply with the Director's Order. A true and correct copy of NEOWC's current policy is attached as Exhibit B. The amended policy did not change the care we were providing under the Director's Order.

17. As consistent with our policy and the Order, in providing care, our "physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order." Our "physicians shall rely on the Director's Order" to make that case-by-case determination. When a patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method. Medication abortion uses less PPE than surgical abortion; indeed, the process of handing patients a pill requires no PPE.

18. NEOWC could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various Ohio restrictions on abortion—such as Ohio's requirements that force patients to make an extra, medically unnecessary trip to the health center, force patients to receive an ultrasound during that unnecessary trip, restrict medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

Harms Caused by the Director's Order and ODH's Threat of Enforcement

19. I am aware of the cease and desist letters that other providers have received and inspections that have occurred. I am also aware of statements made by the ODH Director, the Governor, and the Attorney General. NEOWC reasonably fears that Defendants will “take all appropriate measures” against abortion providers.

20. Without additional guidance from the ODH and in light of the statements of the Governor and Attorney General, I am concerned that NEOWC could lose its license, and NEOWC’s physicians credibly fear being prosecuted if we continue to provide surgical abortions, which means some of our patients will have later abortions or be denied an abortion entirely.

21. NEOWC has several patients already scheduled for surgical abortions in the coming week.

22. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of March, 2020.

/s/ David Burkons, M.D.
David Burkons, M.D.

EXHIBIT A

**NORTHEAST OHIO WOMEN’S CENTER’S POLICY IMPLEMENTING OHIO
DEPARTMENT OF HEALTH’S MARCH 17, 2020, ORDER FOR THE MANAGEMENT
OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio (“Order”). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment (“PPE”) to cease at 5:00 p.m. on March 18, 2020 “for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio.” Northeast Ohio Women’s Center hereby establishes this policy in order to ensure compliance with ODH’s Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, Northeast Ohio Women’s Center has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. Northeast Ohio Women’s Center relies on the following considerations for making this decision:

a. The Order states that a surgery is essential if it cannot “be delayed without undue risk to the current or future health of a patient” and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman’s last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat’l Acads. of Scis. Eng’g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*

b. The recommendation of our Ambulatory Surgical Facility’s Governing Body, which has determined that surgical abortions are essential surgical procedures.

c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to “the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure” because it “is an essential component of comprehensive health care” and “a time-sensitive service for which a delay

of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”

d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by Northeast Ohio Women’s Center while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.

/s/ David Burkons, M.D.
Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT B

**NORTHEAST OHIO WOMEN'S CENTER'S POLICY IMPLEMENTING OHIO
DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER FOR THE MANAGEMENT
OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order") (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Northeast Ohio Women's Center hereby establishes this policy in order to ensure compliance with ODH's Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Northeast Ohio Women's Center physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. Northeast Ohio Women's Center physicians shall rely on the Director's Order and should consider the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.
 - b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

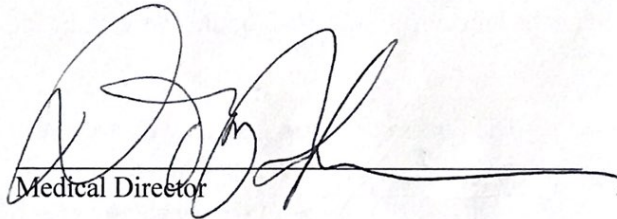
d. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6-8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

3. All essential surgeries and procedures that are performed by Northeast Ohio Women's Center while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.


Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020